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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE EASTERN DISTRICT OF CALIFORNIA
10

11 UNITED STATES OF AMERICA,
12 Plaintiff,

13 v.
14

15 CHRISTOPHER JOSEPH KIRK,
16 Defendant.

1:12-cr-00081 LJO

MEMORANDUM OF PLEA
AGREEMENT UNDER RULE
11(c)(1)(C) OF THE FEDERAL
RULES OF CRIMINAL PROCEDURE

DATE: September 9, 2013
TIME: 8:30 a.m.
CTRM: THREE
HON: LAWRENCE J. O'NEILL

17
18 Under Rule 11(c)(1)(C) of the Federal Rules of Criminal
19 Procedure, the United States of America, by and through Benjamin
20 B. Wagner, the United States Attorney for the Eastern District
21 of California, and Assistant United States Attorney David Gappa,
22 has agreed with the defendant Christopher Joseph Kirk, and his
23 attorney, Jennifer Wirsching, as set forth below. This plea
24 agreement is limited to the United States Attorney's Office for
25 the Eastern District of California (the government) and cannot
26 bind any other federal, state or local prosecuting,
27 administrative or regulatory authority. This document contains
28 the complete plea agreement between the United States Attorney's

1 Office for the Eastern District of California and the defendant
2 regarding this case.

3 1. Charges

4 The defendant acknowledges that he has been charged in a
5 three-count indictment as follows:

6 Receipt and Distribution of Material Involving the Sexual
7 Exploitation of Minors, in violation of Title 18, United States
8 Code, Section 2252(a)(2).

9 The defendant also acknowledges that the indictment
10 contains a forfeiture allegation.

11 2. Nature, Elements and Possible Defenses

12 The defendant has read the charges against him contained in
13 the indictment, and those charges have been fully explained to
14 him by his attorneys. Further, the defendant fully understands
15 the nature and elements of the crimes charged in the indictment
16 to which he is pleading guilty, together with the possible
17 defenses thereto, and he has discussed them with his attorneys.

18 The elements of the crime of Receipt and Distribution of
19 Material Involving the Sexual Exploitation of Minors, as alleged
20 in the indictment, are as follows:

21 First, the defendant knowingly received and
22 distributed a visual depiction in interstate
23 commerce by any means, including a computer;

24 Second, the production of such visual depiction
25 involved the use of a minor engaging in
26 sexually explicit conduct;

27 Third, such visual depiction was of a minor engaged in
28 sexually explicit conduct;

1 Fourth, the defendant knew that such visual
2 depiction was of sexually explicit conduct;
3 and

4 Fifth, the defendant knew that at least one of the
5 persons engaged in sexually explicit conduct in
6 such visual depiction was a minor.

7 3. Agreements by the Defendant

8 (a) Defendant agrees that this plea agreement shall be
9 filed with the court and become a part of the record of the
10 case.

11 (b) Defendant agrees to enter a plea of guilty to Counts
12 One and Two in the indictment, Receipt and Distribution of
13 Material Involving the Sexual Exploitation of Minors, in
14 violation of Title 18, United States Code, Section 2252(a)(2).

15 (c) As specified within Rule 11(c)(1)(C) of the Federal
16 Rules of Criminal Procedure, defendant understands and agrees
17 that the court can either accept this plea agreement entered
18 into by the parties, at which time its sentencing
19 recommendations will be binding upon the court, or the court can
20 reject the agreement. If the court rejects the agreement, the
21 defendant will have the option of requesting a trial or pleading
22 guilty to the charges in the indictment without an agreement
23 with the government.

24 (d) The defendant is aware that Title 18, United States
25 Code, Section 3742 affords a defendant the right to appeal his
26 plea, conviction(s) or any sentence imposed. Acknowledging
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1 this, the defendant knowingly and voluntarily waives any and all
2 Constitutional and statutory rights to appeal his plea,
3 conviction(s), restitution imposed, forfeiture ordered, or his
4 sentence. This waiver of appeal includes, but is not limited
5 to, an express waiver of the defendant's rights to appeal his
6 plea, conviction(s), restitution imposed, forfeiture ordered, or
7 sentence imposed on any ground, including any appeal right
8 conferred by 18 U.S.C. § 3742 or otherwise. The defendant
9 further agrees not to contest his plea, conviction(s),
10 restitution imposed, forfeiture ordered, or sentence imposed in
11 any post-conviction proceeding, including but not limited to a
12 proceeding under 28 U.S.C. § 2255 or § 2241.
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14 (e) The defendant further acknowledges that his pleas of
15 guilty are voluntary and that no force, threats, promises or
16 representations have been made to anybody, nor agreement
17 reached, other than those set forth expressly in this agreement,
18 to induce the defendant to plead guilty.
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20 (f) The defendant agrees to waive all rights under the
21 "Hyde Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), to
22 recover attorney's fees or other litigation expenses in
23 connection with the investigation and prosecution of all charges
24 in this case and of any related allegations (including without
25 limitation any charges to be dismissed under this plea agreement
26 and/or any charges previously dismissed).
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1 (g) The defendant agrees that the sentencing court will
2 consult the 2012 edition of the United States Sentencing
3 Commission's Sentencing Guidelines (USSG), as promulgated by the
4 Sentencing Commission under the Sentencing Reform Act of 1984,
5 18 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998, and as modified
6 by United States v. Booker and United States v. Fanfan, 543 U.S.
7 220 (2005)), and must take the USSG into account when
8 determining a reasonable sentence in light of the factors set
9 forth in 18 U.S.C. § 3553(a).

11 (h) Defendant agrees that his conduct is governed by USSG
12 Section 2G2.2, and that, for purposes of determining a
13 reasonable sentence under the facts unique to this case, the
14 base offense level for his crime is twenty (20) under USSG §§
15 2G2.2(a)(2) and (b)(1); plus two (2) levels for receiving
16 sexually explicit images of minors involving the use of a
17 computer (§2G2.2(b)(6)); plus two (2) levels for receiving
18 sexually explicit images of prepubescent minors and/or children
19 under twelve (12) years of age (§2G2.2(b)(2)); plus five (5)
20 levels because the offense to which defendant is pleading guilty
21 involves more than 600 images (§2G2.2(b)(7)); plus four (4)
22 additional levels for receiving sexually explicit images of
23 minors that involve the portrayal of sadistic, masochistic or
24 other depictions of violence (§2G2.2(b)(4) for a total adjusted
25 offense level of thirty-three (33).
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28 (i) The defendant agrees that his total offense level,

1 after a reduction of three (3) levels for acceptance of
2 responsibility, will be thirty (30). The defendant agrees that
3 one component of an overall "reasonable sentence" will be a term
4 of federal imprisonment in the range of 97-121 months. More
5 specifically, the defendant agrees that he will not, directly or
6 indirectly, request a sentence of imprisonment of less than one
7 hundred eight (108) months by way of a request for a downward
8 departure in offense level or criminal history category or by
9 reference to sentencing factors under 18 U.S.C. § 3553(a) or any
10 other means.

12 (j) The defendant agrees that one component of an
13 overall reasonable sentence will be a term of supervised release
14 of one hundred eighty (180) months.

16 (k) If the defendant's conviction(s) on the counts to
17 which he is pleading guilty are ever vacated at his request,
18 or his sentence is ever reduced at his request, the government
19 will have the right (1) to prosecute the defendant on any of
20 the counts to which he pleaded guilty, (2) to reinstate any
21 counts that might be dismissed under this agreement, and (3) to
22 file any new charges that would otherwise be barred by this
23 agreement. The decision to pursue any or all of these options
24 is solely in the discretion of the United States Attorney's
25 Office. By signing this agreement, the defendant agrees to
26 waive any objections, motions, and defenses he might have to the
27 government's decision, including Double Jeopardy. In
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1 particular, he agrees not to raise any objections based on the
2 passage of time with respect to such counts including, but not
3 limited to, any statutes of limitation or any objections based
4 on the Speedy Trial Act or the Speedy Trial Clause of the Sixth
5 Amendment.

6
7 (1) The defendant agrees not to move for a downward
8 departure in this case, including a downward departure in
9 offense level or criminal history category. He will not do this
10 directly or indirectly, or in any other way request a sentence
11 of imprisonment lower than the 108-month term that he agrees is
12 reasonable. The defendant understands and agrees that this
13 agreement by him includes, without limitation, not moving for a
14 downward departure of his offense level, criminal history
15 category or criminal history points as defined by the Sentencing
16 Guidelines. Additionally, the defendant agrees that the
17 application of the Sentencing Guidelines to this case results in
18 a reasonable sentence and that the defendant will not request
19 that the court apply the sentencing factors under 18 U.S.C. §
20 3553 to arrive at a term of imprisonment lower than the range of
21 97-121 months. The defendant acknowledges that, if the
22 defendant requests or suggests in any manner a sentence other
23 than that to which the parties agree in this plea agreement, the
24 government, at its sole discretion, may withdraw from this plea
25 agreement and continue with its prosecution of the defendant as
26 if the parties had not entered into this plea agreement.
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1 (m) The defendant agrees that his release pending
2 sentencing is restricted by 18 U.S.C. § 3143(a), and he agrees
3 that he will be remanded into custody upon entry of his guilty
4 plea on September 9, 2013.

5 (n) Defendant agrees that his conduct is governed by
6 mandatory restitution under 18 U.S.C. § 2259 and agrees to pay
7 any victims the full amount of their losses as ordered by the
8 court and as a result of the defendant's conduct as charged in
9 the indictment. Defendant agrees that mandatory restitution
10 applies to those victims affected by the charges as set forth in
11 the indictment, including any counts being dismissed as part of
12 the plea agreement and regardless of whether or not the victims
13 are included in the factual basis.
14

15 (o) The defendant acknowledges that he has been advised,
16 and he understands, that under the Sex Offender Registration and
17 Notification Act, a federal law, that he must register and keep
18 his registration current in each of the following jurisdictions:
19 where he resides, where he is an employee, and where he is a
20 student. He understands that the requirements for registration
21 include providing his name, his residence address, and the names
22 and addresses of any places where he is or will be an employee
23 or student, among other information. He further understands
24 that the requirement to keep the registration current includes
25 informing at least one jurisdiction in which he resides, is an
26 employee, or student not later than three business days after
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1 any change in name, residence, employment, or student status.
2 The defendant has been advised, and understands, that failure to
3 comply with these obligations may subject him to prosecution for
4 failure to register under federal law, 18 U.S.C. § 2250, which
5 is punishable by a fine or imprisonment, or both.

6 (p) The defendant acknowledges that a forfeiture allegation
7 has been filed against him in the indictment in this case, and
8 he will admit this allegation and not contest the forfeiture of
9 any items listed in this allegation.

10 Defendant agrees that the listed assets constitute,
11 property which contains visual depictions mailed, shipped, or
12 transported in violation of 18 U.S.C. § 2252(a)(2) or were used
13 or intended to be used in any manner or part to commit and to
14 promote the commission of the aforementioned violation, all in
15 violation of 18 U.S.C. § 2253.

16 Defendant agrees to fully assist the government in the
17 forfeiture of the listed assets and to take whatever steps are
18 necessary to pass clear title to the United States. Defendant
19 shall not sell, transfer, convey, or otherwise dispose of any of
20 his assets, including but not limited to, the above-listed
21 assets.

22 Defendant agrees not to file a claim to any of the listed
23 property in any civil proceeding, administrative or judicial,
24 which might be initiated. Defendant agrees to waive his right
25 to notice of any forfeiture proceeding involving this property,

1 and agrees to not file a claim or assist others in filing a
2 claim in that forfeiture proceeding.

3 The defendant waives oral pronouncement of forfeiture at
4 the time of sentencing and any defects in such pronouncement
5 that pertain to forfeiture, and waives any defenses to
6 forfeiture, including any defense predicated on the Ex Post
7 Facto, Double Jeopardy, and Excessive Fines Clauses of the
8 United States Constitution. The defendant knowingly and
9 voluntarily waives any right to a jury trial in any criminal or
10 civil forfeiture proceeding.

12 4. Agreements by the Government

13 (a) The government agrees that the defendant's conduct is
14 governed by USSG Section 2G2.2.

15 (b) The government will recommend a three-level reduction
16 in the computation of his offense level if the defendant clearly
17 demonstrates acceptance of responsibility for his conduct as
18 defined in Section 3E1.1 of the United States Sentencing
19 Commission Guidelines Manual.

20 (c) The government will recommend a sentence that includes
21 a term of imprisonment of 108 months in Bureau of Prisons
22 custody as one component of an overall reasonable sentence.

23 (d) The government will recommend that the court impose a
24 term of supervised release of one hundred eighty (180) months.
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1 5. Special Assessment & FLU

2 (a) Defendant agrees to pay a special assessment of
3 \$200.00 at the time of sentencing by delivering a check or money
4 order payable to the United States District Court to the United
5 States Probation Office immediately before the sentencing
6 hearing. The defendant understands that this plea agreement is
7 voidable by the government if the defendant fails to pay the
8 assessment prior to that hearing.

9 (b) Defendant agrees to make a full and complete
10 disclosure of defendant's assets and financial condition, and
11 will complete the United States Attorney's Office's
12 "Authorization to Release Information" and "Financial Affidavit"
13 within four (4) weeks from the entry of the defendant's change
14 of plea. The defendant also agrees to have the court to enter
15 an order to that effect.

16 6. Immigration Consequences

17 Defendant recognizes that pleading guilty may have
18 consequences with respect to his immigration status if he is not
19 a citizen of the United States. The defendant's guilty plea(s)
20 in this case might subject him to removal from the United
21 States. Defendant affirms that he has been advised of the
22 potential immigration consequences of pleading guilty and wants
23 to plead guilty regardless of any immigration consequences that
24 might result from his plea, even if such consequence includes
25 his automatic deportation and removal from the United States
26 after completing any sentence of incarceration due to his plea.

1 7. Factual Basis

2 The defendant will plead guilty because he is in fact
3 guilty of the crimes set forth in Counts One and Two of the
4 indictment. Defendant also agrees that the following are the
5 facts of this case, although he acknowledges that, as to other
6 facts, the parties may disagree:

7 On unknown dates as well as on March 9, 2006, and
8 March 13, 2006, in Kern County, within the State and
9 Eastern District of California and elsewhere, the
10 defendant knowingly received visual depictions that
11 had been mailed, shipped, or transported in interstate
12 or foreign commerce, or which contained materials that
13 had been so mailed, shipped, or transported. In
14 addition, the producing of the depictions involved one
15 or more minors engaging in sexually explicit conduct
16 and were of such conduct, specifically: the defendant,
17 using a computer and modem, received via the internet
18 and interstate commerce, at least one visual
19 depiction, which the defendant then knew was a visual
20 depiction, the producing of which involved the use of
21 a minor engaged in sexually explicit conduct and was
22 of such conduct as defined in Title 18, United States
23 Code, Section 2256, all in violation of Title 18,
24 United States Code, Section 2252(a)(2). Several of
25 the images depicted prepubescent minors, some were
26 depictions of violence and/or sadistic or masochistic
27 conduct, and the total number of images the defendant
28 received was more than 600.

19 8. Potential Sentence

20 The following is the maximum potential sentence which
21 defendant faces for each count:

22 (a) Imprisonment.

23 Minimum (Mandatory): Five (5) years.
24 Maximum: Twenty (20) years.

25 (b) Fine.

26 Maximum: Two Hundred Fifty Thousand Dollars
27 (\$250,000).

28 (c) Both such fine and imprisonment.

29 (d) Term of Supervised Release.

1 Minimum: Five Years.

2 Maximum: Lifetime (18 U.S.C. 3583(k))

3 (Should the defendant violate any of the terms of
4 his supervised release, he can be returned to
5 prison for the remaining period of supervised
6 release actually imposed by the court or five
7 years, whichever is less.)

8 (e) Penalty Assessment:

9 Mandatory: One Hundred Dollars (\$100).

10 (f) Restitution:

11 Mandatory.

12 9. Waiver of Rights

13 Defendant understands that by pleading guilty he surrenders
14 certain rights, including the following:

15 (a) If defendant persisted in a plea of not guilty to the
16 charges against him, he would have the right to be represented
17 by an attorney at all stages of the proceedings, and would have
18 a right to a public and speedy trial. The trial could be either
19 a jury trial or a trial by a judge sitting without a jury.

20 Defendant has a right to a jury trial. However, in order that
21 the trial be conducted by the judge sitting without a jury,
22 defendant, the government and the judge all must agree that the
23 trial be conducted by the judge without a jury.

24 (b) If the trial were a jury trial, the jury would be
25 composed of twelve lay persons selected at random. Defendant
26 and his attorney would have a say in who the jurors would be by
27 removing prospective jurors for cause where actual bias or other
28 disqualification is shown, or without cause by exercising
peremptory challenges. The jury would have to agree unanimously

1 before it could return a verdict of either guilty or not guilty.
2 The jury would be instructed that defendant is presumed innocent
3 and that it could not convict him unless, after hearing all the
4 evidence, it was persuaded of his guilt beyond a reasonable
5 doubt.

6 (c) If the trial were held before a judge without a jury,
7 the judge would find the facts and determine, after hearing all
8 the evidence, whether or not he was persuaded of the defendant's
9 guilt beyond a reasonable doubt.

10 (d) At a trial, whether by a jury or a judge, the
11 government would be required to present its witnesses and other
12 evidence against defendant. Defendant would be able to confront
13 those government witnesses and his attorney would be able to
14 cross-examine them. In turn, defendant could present witnesses
15 and other evidence on his own behalf. If the witnesses for
16 defendant would not appear voluntarily, he could require their
17 attendance through the subpoena power of the Court. At trial,
18 the defendant would also have the right to assistance of legal
19 counsel. If he could not afford legal counsel, one would be
20 appointed for him by the court at no expense to him.

21 (e) At a trial, defendant would have a privilege against
22 self-incrimination so that he could decline to testify, and no
23 inference of guilt could be drawn from this refusal to testify.

24 Defendant understands that by pleading guilty he is waiving
25 all of the rights set forth above and defendant's attorney has
26 explained those rights to him and the consequences of his waiver
27 of those rights.

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1 10. Questions by Court.

2 Defendant understands that if the court questions him under
3 oath, on the record and in the presence of counsel, about the
4 offenses to which he is pleading guilty, his answers, if false,
5 may later be used against him in a prosecution for perjury.

6 11. Entire Agreement.

7 These pleas of guilty are freely and voluntarily made and
8 not the result of force or threats or of promises apart from
9 those set forth in this plea agreement. There have been no
10 representations or promises from anyone as to what sentence this
11 court will ultimately impose, although the parties have agreed
12 upon what they consider to be the parameters of a reasonable
13 sentence within this agreement.

14 12. Court not a Party.

15 It is understood by the parties that the sentencing court
16 is neither a party to nor bound by this agreement and the
17 sentencing judge is free to impose the maximum penalties as set
18 forth in paragraph eight (8). Further, in making its sentencing
19 decision, the court may take into consideration any and all
20 facts and circumstances concerning the criminal activities of
21 defendant, including activities which might not have been
22 charged in the indictment.

23 13. Presentence Report.

24 Defendant understands that the United States Probation
25 Office is not a party to this agreement and will conduct an
26 independent investigation of defendant's activities and his
27 background. It will then prepare a presentence report which it
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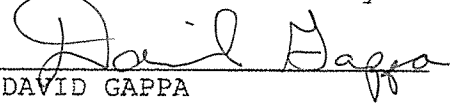
1 will submit to the court as its independent sentencing
2 recommendation. In addition, the government will fully apprise
3 the Probation Office, as well as the court, of the full and true
4 nature, scope and extent of the defendant's criminal activities,
5 including information on his background and criminal history.

6 Dated:

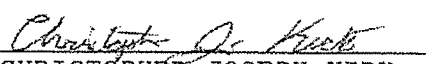
BENJAMIN B. WAGNER
United States Attorney

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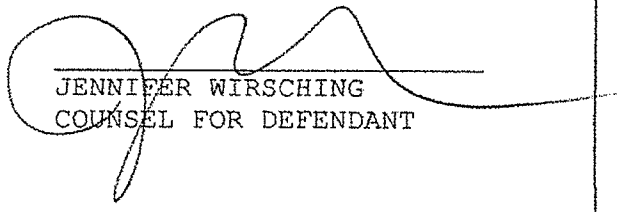
By:


DAVID GAPPA
Assistant U.S. Attorney

9
10 Dated: 9/18/13


CHRISTOPHER JOSEPH KIRK
DEFENDANT

11
12 Dated: 9/17/13


JENNIFER WIRSCHING
COUNSEL FOR DEFENDANT